Supreme Court, U.S.
FILED
AUG 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1853

In the Supreme Court of the United States

OCTOBER TERM, 1990

FRANK W. SNEPP, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in refusing to modify an injunction—which requires petitioner to submit writings relating to the CIA for prepublication review and which was upheld by this Court in *Snepp* v. *United States*, 444 U.S. 507 (1980) (per curiam)—so as to place on the CIA the burden of initiating judicial proceedings to resolve disputes arising from prepublication review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 897 F.2d 138. The opinion of the district court (Pet. App. 13a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) was entered on February 27, 1990. The petition for a writ of certiorari was filed on May 29, 1990 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks further review of a decision declining to modify the terms of an injunction entered

against him in 1978. This injunction, which was affirmed by this Court in 1980, *Snepp* v. *United States*, 444 U.S. 507 (per curiam), requires petitioner to submit writings containing information relating to the CIA for prepublication review and effectively prohibits publication without the CIA's permission. Petitioner contends that the injunction should be modified to place on the CIA the burden of initiating judicial review of disputes arising from these procedures.

1. As a condition of employment with the CIA, employees sign agreements in which they promise (1) to submit writings containing information on CIA activities to the agency for prepublication review and (2) not to publish those materials without specific CIA approval. See C.A. App. 109-111. As this Court has noted, these agreements are an "integral part of" the employees' undertaking "not to disclose any classified information relating to the Agency without proper authorization." *Snepp* v. *United States*, 444 U.S. at 508. In 1977, the CIA established the Publications Review Board (PRB). Its function is to review the writings and proposed oral presentations of present and former CIA employees who are subject to prepublication review to determine whether those materials contain classified information or divulge intelligence data or activities of the CIA. C.A. App. 44, 109. The purpose of prepublication review "is to ensure that the manuscript contains no classified information that the author learned in the course of his employment." C.A. App. 43. The policy of the Board is to respond as rapidly as possible to prepublication submissions and to work closely with an author to find "acceptable unclassified alternatives that will allow

him to convey the message he wishes to publish." C.A. App. 43-44, 112.

2. When he joined the CIA in 1968, petitioner signed an agreement in which he promised that he would "not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency." *Snepp* v. *United States*, 444 U.S. at 508. Upon leaving the CIA, Snepp also signed a termination agreement, reaffirming his promise not to reveal "any classified information, or any information concerning intelligence or CIA that has not been made public by CIA . . . without the express written consent of the Director of Central Intelligence or his representative." *Id.* at 508 n.1.

Petitioner violated his obligations to the CIA when he published a book about CIA activities without prior Agency approval. *Snepp* v. *United States*, 444 U.S. at 508. The CIA brought suit in the United States District Court for the Eastern District of Virginia, seeking to impose a constructive trust on profits derived from the book and to enforce the confidentiality agreements. Pet. App. 2a. The district court found that petitioner had "willfully, deliberately and surreptitiously breached his position of trust with the CIA and the [1968] secrecy agreement" and had "deliberately misled CIA officials into believing that he would submit the book for prepublication clearance." *Snepp* v. *United States*, 444 U.S. at 508. Based upon a determination that petitioner's publication of his book had "caused the United States irreparable harm and loss," the court entered the injunction at issue here and imposed a constructive trust on profits flowing from the book. *Id.* at 508-509.

The injunction prohibits petitioner from (Pet. App. 20a-21a)

> further breaching the terms and conditions of [his] Secrecy Agreement and fiduciary duty with the Central Intelligence Agency by failing to submit any manuscript or other writing containing information which relates to the Central Intelligence Agency, its activities, intelligence activities generally or intelligence sources and methods, which information the defendant gained during the course of or as a result of his employment with the Central Intelligence Agency, for Agency review prior to publication; *Provided*, however, that Agency review shall be made within thirty (30) days after receipt of such writing, and *Provided*, further, that the only material for which approval for publication may be withheld by the Agency is that material which the Agency determines to be classified.

The court of appeals upheld the injunction and the findings on which it was based, but reversed the imposition of the constructive trust. *United States* v. *Snepp*, 595 F.2d 926, 935 (4th Cir. 1979), rev'd in part, 444 U.S. 507 (1980).

Petitioner and the United States cross-petitioned for further review. This Court upheld the injunction and reinstated the constructive trust on the profits from the book. *Snepp* v. *United States*, 444 U.S. at 516. The Court observed that petitioner's agreement was "an 'entirely appropriate' exercise of the CIA Director's statutory mandate to 'protec[t] intelligence sources and methods from unauthorized disclosure.'" *Id.* at 509 n.3. The Court also found that the government "has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality

so essential to the effective operation of our foreign intelligence service." *Ibid.* Petitioner's agreement, the Court continued, was "a reasonable means for protecting this vital interest." *Ibid.* In a footnote, the Court's opinion also stated (*id.* at 513 n.8):

> The dissent argues that the Court is allowing the CIA to "censor" its employees' publications. *Post*, at 522. [Petitioner's] contract, however, requires no more than a clearance procedure subject to judicial review. If [petitioner], in compliance with his contract, had submitted his manuscript for review and the Agency had found it to contain sensitive material, presumably—if one accepts [petitioner's] present assertion of good intentions—an effort would have been made to eliminate harmful disclosures. Absent agreement in this respect, the Agency would have borne the burden of seeking an injunction against publication. See *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362 (CA4), cert. denied, 421 U.S. 992 (1975); *United States* v. *Marchetti*, 466 F.2d 1309 (CA4), cert. denied, 409 U.S. 1063 (1972).

3. The present dispute stems from petitioner's submission of an outline of a potential television mini-series, entitled *Background: Lawcase Story*, for prepublication review. On November 22, 1985, as required by the injunction and his agreement, petitioner submitted this manuscript to the CIA. After some back-and-forth, the PRB issued a decision requiring 11 specific deletions from the manuscript before publication. Negotiations continued, and petitioner took an administrative appeal from the PRB's ruling. Ultimately, the CIA reversed the PRB with respect to all but one deletion. In the meantime, however, petitioner's television deal had fallen through. Pet. App. 4a.

Three years after submitting the manuscript for prepublication review, petitioner filed a motion in the district court seeking (1) an order to show cause why the government should not be held in contempt for failing to complete its review of the manuscript in the time required by the injunction, (2) damages, (3) an order disapproving the deletion required by the CIA, and (4) modification of the injunction to require the CIA to initiate judicial proceedings to resolve disputes arising from prepublication review. Pet. App. 5a, 14a.

The district court denied the contempt motion, finding that the CIA had made "substantial and diligent efforts in attempting to comply" with its obligations under the injunction. Pet. App. 17a. The court also declined to modify the injunction. After reviewing decisions by this Court that prescribe the standards governing such requests, the district court concluded that there had been "no appropriate showing by [petitioner] requiring modification or clarification." *Id.* at 18a. In addition, the court denied petitioner's request for damages and upheld the deletion in the manuscript that the CIA had prescribed. *Id.* at 17a, 18a.

4. On appeal, petitioner challenged only the district court's decision not to modify the injunction. The court of appeals affirmed. Pet. App. 1a-10a. The court noted that an injunction may be modified "where warranted by a change in the law or the circumstances," but that a district court's refusal to disturb a prior order is reviewable only for an abuse of discretion. *Id.* at 5a. Petitioner, the court stated, had not pointed to "a change in the law or circumstances which existed at the time his injunction was affirmed by the Supreme Court." *Id.* at 6a. Noting that petitioner was "essentially arguing that the

original decision in his case should have placed the burden on the CIA to seek judicial review," the court held that "[r]easserting the merits of his case does not * * * justify altering an injunction." *Id.* at 6a-7a.

The court also concluded that petitioner's request for modification of the injunction was foreclosed by *United States* v. *Marchetti*, 466 F.2d 1309, cert. denied, 409 U.S. 1063 (1972), a case in which the Fourth Circuit had held that a CIA employee should have the responsibility for initiating judicial review when disputes arise out of the CIA's prepublication review procedures. Pet. App. 7a-8a. The court rejected petitioner's contention that footnote 8 in this Court's *Snepp* opinion had overruled *Marchetti* and mandated placement of the burden of initiating review on the CIA. *Id.* at 9a-10a. The court of appeals explained that "[w]hile the language in the footnote arguably imposes on the CIA the burden of seeking an *injunction* by initiating a legal proceeding, such a requirement would not eliminate [petitioner's] burden to seek judicial review of the Agency's decision to withhold approval." *Id.* at 9a. The court added that the footnote had cited *Marchetti* with approval and that this Court "found the secrecy agreement enforceable and affirmed the injunction," indicating "that CIA approval is a precondition to publication." *Id.* at 10a.

ARGUMENT

The court of appeals declined to modify an injunction that this Court upheld on direct review. This decision does not conflict with decisions of other courts of appeals and presents no question of general importance warranting this Court's attention. Petitioner's assertion that a footnote in the Court's opinion upholding the injunction requires modification of that decree is without merit; the footnote cannot fairly be read to contradict the Court's disposition of the case. Further review is not warranted.

1. Petitioner's fundamental contention is that the injunction requiring him to submit his manuscripts for prepublication review improperly requires him to bear the burden of initiating judicial proceedings in the event of a dispute. In his view, the injunction should conform to the standards set forth by this Court in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). See Pet. 11-12. In those cases, the Court held unconstitutional procedures under which state and local authorities prescreened films and performances to determine their suitability for the public.

Both *Freedman* and *Southeastern Promotions* were decided years before petitioner sought direct review of his injunction in this Court. Moreover, in 1972, the Fourth Circuit held that not all of the procedures mandated by *Freedman* were required in the context of the CIA's program of prepublication review. *United States* v. *Marchetti*, 466 F.2d at 1317. With respect to the burden of initiating judicial review, *Marchetti* concluded (*ibid.* (emphasis added)):

> [S]ince First Amendment rights are involved, we think Marchetti would be entitled to judicial

> review of any action by the CIA disapproving publication of the material. Some such review would seem essential to the enforcement of the prior restraint imposed upon Marchetti and other former employees. [Citing *Freedman*] *Because of the sensitivity of the area and confidentiality of the relationship in which the information was obtained, however, we find no reason to impose the burden of obtaining judicial review upon the CIA. It ought to be on Marchetti.*

Petitioner was undoubtedly aware that his injunction would be applied in accordance with this ruling. Nevertheless, he chose not to seek review in this Court of the question whether the injunction was consistent with the principles set forth in *Freedman* and *Southeastern Promotions*; in fact, the petition cited neither case. See 78-1871 Pet. at 2. This Court rejected the claims that petitioner did raise and upheld the injunction. *Snepp* v. *United States*, 444 U.S. at 516.

It is well established that "a sound judicial discretion may call for modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *System Fed'n No. 91* v. *Wright*, 364 U.S. 642, 647 (1961); see Fed. R. Civ. P. 60(b)(5) (allowing relief from a final judgment when "it is no longer equitable that the judgment should have prospective application"). However, a request for modification of an injunction "is not a means by which a losing litigant can attack the court's decree collaterally." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2961, at 600-601 (1973). As this Court observed in *United*

States v. *Swift & Co.*, 286 U.S. 106, 119 (1932), in reversing an order modifying an injunction:

> The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.

See also *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968). When a district court considers a request for modification of an injunction, "[a] balance must * * * be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances." *System Fed'n No. 91* v. *Wright*, 364 U.S. at 647-648. Necessarily, "[w]here there is such a balance of imponderables there must be wide discretion in the District Court." *Id.* at 648.

Both lower courts adhered to these general principles. The district court recognized that it had authority to modify the injunction to accommodate changed circumstances, but found that petitioner had made "no appropriate showing * * * requiring modification or clarification." Pet. App. 18a. The court of appeals correctly limited its review to "an abuse of discretion standard." *Id.* at 5a. It held, *inter alia* (*id.* at 6a-7a):

> [N]othing [petitioner] cites is a change in the law or the circumstances which existed at the time his injunction was affirmed by the Supreme Court. He is essentially arguing that the original decision in his case should have placed the burden on the CIA to seek judicial review. Reasserting the merits of his case does not, however, justify altering an injunction.

This determination, which is sufficient to sustain the court of appeals' judgment regardless of the merits of petitioner's constitutional contentions, presents no question warranting this Court's review.

2. Footnote 8 in the Court's opinion in *Snepp* v. *United States*, *supra*, does not require modification of the injunction. In the first place, the footnote cannot fairly be construed to contradict the Court's disposition of the case. Second, the footnote does not even address the issue presented by petitioner's request for modification of his injunction; it does not say that an injunction entered against an individual who has violated his agreements with the CIA must place the burden of initiating judicial review on the agency. Rather, addressing the hypothetical case that would have arisen had petitioner submitted his manuscript for review and thereafter threatened to publish it, the footnote observes that the CIA "would have borne the burden of seeking an injunction against publication." 444 U.S. at 513 n.8. That proposition provides no support for petitioner's position that the CIA invariably has the burden of initiating review. The footnote acknowledges that if an employee seeks to publish without obtaining CIA approval, the agency has the burden of seeking an injunction. However, if the employee believes that approval has been improperly withheld and wishes to obtain a court order permitting publication, he must seek it. That was the holding of *Marchetti*—a decision that found "no reason to impose the burden of obtaining judicial review upon the CIA" (466 F.2d at 1317). In footnote 8, this Court cited *Marchetti* with approval; the footnote cannot reasonably be read to establish the exact opposite proposition.

As the court of appeals concluded, footnote 8 does not require the Fourth Circuit to abandon *Marchetti*

as the law of the circuit or compel modification of the injunction.

3. Finally, even if it were properly presented in this case, the question whether the CIA should bear the burden of initiating judicial proceedings to resolve disputes arising from agreements calling for prepublication review would not call for the Court's attention. At bottom, petitioner's position rests on the proposition that there is no constitutionally significant difference between the arrangements that the CIA has adopted to safeguard classified information and schemes providing for preclearance of movies and other forms of public entertainment.

Nothing in the Court's decisions supports that proposition,* and *Marchetti*—the one court of appeals decision to address it squarely—rejected it. The precise equivalent of the procedures required by *Freedman* was not mandatory in this area, the *Marchetti* court found, in view of "the sensitivity of the area and confidentiality of the relationship in which information was obtained," the limited need for judicial review in light of the "narrow areas for possible disagreement," and the authority that the Executive exercises in the conduct of foreign relations and intelligence matters. 466 F.2d at 1317. Other decisions addressing the legality of the CIA's prepublication review procedures cast no doubt on *Marchetti*. Indeed, they have uniformly upheld the constitutionality of the CIA's confidentiality agreements, recognizing the important interests that strict compliance with those agreements serve. See *McGehee* v. *Casey*, 718 F.2d 1137, 1140 (D.C. Cir. 1983); *Alfred A. Knopf, Inc.*

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* Cf. *FW/PBS, Inc.* v. *Dallas*, 110 S. Ct. 596, 606 (1990) (declining to require "full procedural protections set forth in *Freedman*" for licensing scheme for adult businesses).

v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975). See also *United States* v. *Morison*, 844 F.2d 1057, 1068-1069 (4th Cir.), cert. denied, 109 S. Ct. 259 (1988).

Petitioner argues that his injunction should be modified to conform to a Department of Justice regulation governing employees with access to classified information. Pet. 16-18. However, the procedures mandated by the regulation are not constitutionally required. Petitioner presented no considerations justifying modification of the injunction, and the court of appeals correctly ruled that it was not an abuse of discretion to refuse to amend it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20041